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In the Supreme Court of the United States

OCTOBER TERM, 1984

ATTORNEY GENERAL OF THE TERRITORY
OF GUAM, ETC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners, citizens of Guam, contend that the Constitution gives them a right to vote in the election for President and Vice President of the United States.

1. Petitioners, four individual citizens of Guam and the Attorney General of Guam as *parens patriae* for the citizenry of Guam, brought this suit in the District Court of Guam seeking a declaratory judgment that all United States citizens residing in Guam have the right to vote for President and Vice President of the United States.¹ The district court dismissed the suit (Pet. App. A 1-15). The court first held that petitioners lacked standing (*id.* at 2-4). The court went on, however, to address the merits, concluding that the

¹Congress has provided that persons born in Guam are United States citizens. 8 U.S.C. 1407.

Constitution limits participation in elections for President and Vice President to citizens of the states, and hence citizens of Guam do not qualify (*id.* at 10-11).

The court of appeals affirmed on the merits (Pet. App. B 1-11; 738 F.2d 1017).² The court explained that the Constitution (Art. II, § 1) does not grant American citizens the right to elect the President; rather, under the Electoral College system, that right is bestowed upon state electors who are selected by the citizens of each state (Pet. App. B 3-5). The court noted that, because of this constitutional framework, it was necessary to adopt the 23rd Amendment in order to allow residents of the District of Columbia to vote in Presidential elections (see *id.* at 5-7). The court also rejected petitioners' reliance on *Oregon v. Mitchell*, 400 U.S. 112 (1970), and the Overseas Citizens Voting Rights Act of 1975 (OCVRA), 42 U.S.C. 1973dd *et seq.*, explaining that that decision and statute applied only to persons who were already citizens of a state and therefore provided no basis for inferring a right to vote for citizens of Guam (Pet. App. B 7-11).

2. Relying on statutes enacted by Congress and decisions of this Court that have "identified the right to vote for national officers as an inherent right and privilege of national citizenship" (Pet. 19), petitioners apparently contend (Pet. 19-23) that the right to vote in a Presidential election must be accorded to citizens of the United States who reside in Guam. This contention is wholly without merit for reasons well stated by the court of appeals (Pet. App. B 7-11). Nothing in *Oregon v. Mitchell*, *supra*, or the OCVRA indicates that Congress has the power to confer the right to vote for President on individuals who are not citizens of a state. Indeed, petitioners concede (Pet. 23) that

²The court of appeals did not address the standing question (Pet. App. B 11 n.1).

they "are not asking the Court to determine that the Territory of Guam is entitled to electoral votes in the electoral college." That is a wise concession, since such a change plainly is one that would have to be made by constitutional amendment, as in the case of the District of Columbia. But petitioners do not explain how their supposed constitutional right to vote for President would be exercised if Guam has no electors.³ The Constitution simply does not require that citizens of Guam be given the right to vote in Presidential elections; to the contrary, the framework of the Constitution leaves no room for them to do so.

3. Petitioners' primary contention in this Court (Pet. 17-19) is that the Equal Protection Clause requires that one of the petitioners, a former resident of California who was registered to vote there, be allowed to vote in Presidential elections as a citizen of California. This contention is based on OCVRA, which provides that former United States residents now residing outside the United States who are otherwise qualified to register to vote in the last state in which they resided are granted the right to vote by absentee ballot in federal elections in that state. 42 U.S.C. 1973dd-1. The Act does not by its terms provide similar rights for persons who move from a state to Guam.

This contention is raised for the first time in this Court (see Pet. App. B 10-11). Petitioners offer no reason for not raising this issue below. Long before their certiorari petition was filed, petitioners certainly were aware of the constitutional significance of residence in a state. The district court's decision quite clearly was premised on the fact that the Constitution provides for participation in Presidential elections only by residents of a state (see Pet. App. A 10-11, 14).

³In the court of appeals, petitioners suggested (Br. 23) that Guam citizens could vote for electors in Hawaii. That suggestion has apparently been abandoned here.

Yet petitioners did not raise this issue on appeal, nor did they seek rehearing in the court of appeals when the district court's decision was affirmed on this ground. In these circumstances, this Court should not now consider petitioners' contention. See *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Duignan v. United States*, 274 U.S. 195, 200 (1927).

In any event, petitioners' equal protection claim is without merit because there is a rational basis for distinguishing between citizens of a state who move to another country and those who move to Guam. Those who move to another country have no right to vote in any federal election in their new place of residence. By contrast, residents of Guam vote for the Delegate from Guam to the United States House of Representatives; OCVRA specifically defines the election of that official as a "Federal election." 42 U.S.C. 1973dd(1). It is reasonable for Congress to avoid creating a system in which a person can vote in federal elections in two different jurisdictions.⁴

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JANUARY 1985

⁴Indeed, application of OCVRA to persons who move to Guam and vote there would create the anomaly that those persons would be allowed to vote for two members of the House of Representatives: one from their former state and the Delegate from Guam. Surely, Congress does not violate the Constitution by preventing this from occurring.

